United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,055

MILTON T. SMITH, JR.,

Appellant,

768

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From Judgment Of The
United States District Court

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 11 1965

Nathan J. Paulson
CLERK

William W. Greenhalgh
William B. Martin
Jefferson D. Kirby, III
Marvin J. Brenner
Robert S. Hall, Jr.
David E. Aaronson

424 Fifth Street, N. W.
Washington, D. C.

Counsel for the Appellant
(Appointed by this Court

Washington, D. C.
June 11, 1965

I N D E X

STATEMENT OF QUESTIONS PRESENTED

I

Whether the court below erred in denying appellant's motion to suppress the evidence obtained as a result of the arrest of June 10, 1964, without an arrest or search warrant, and without probable cause to arrest without a warrant, in violation of the Fourth Amendment to the Constitution of the United States:

A. Because a private residence, known to members of the Gambling and Liquor Squad as a place where illegal liquor was sold, was entered without an arrest or search warrant, as one of a series of raids, undertaken at an early hour of the morning, to seize illegal liquor.

B. Because the entry into a private residence was made in an unlawful manner and the evidence obtained from inside the residence was the fruit of the unlawful entry.

C. Because there was not a sufficient basis to arrest appellant for a misdemeanor, without an arrest warrant, assuming there was no requirement to obtain an arrest or search warrant prior to entering the premises.

II

Whether the court below erred in denying appellant's motion to suppress the evidence obtained as a result of the

arrest of June 18, 1964, because the arrest was executed in an unlawful manner, contrary to 4(c)(3) of the Federal Rules of Criminal Procedure:

A. Because the arrest warrant was at the Robbery Squad Office at the time of the arrest, and its location known to Lieutenant Ruff, who ordered Officers Best and Ison to arrest appellant, and because failure to obtain the arrest warrant and to execute it at the time of the arrest was the result of mere inconvenience or inexcusable neglect.

B. Because the arrest, without obtaining and executing the arrest warrant, was made without informing appellant at the time of his arrest of the existence of a valid arrest warrant.

TABLE OF AUTHORITIES

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

An indictment was filed on July 17, 1964, in the United States District Court for the District of Columbia charging appellant in the first and third counts with violation of 26 U.S.C. §4704(a) and in the second and fourth counts with violations of 21 U.S.C. §174. Jurisdiction was vested in the District Court by virtue of 18 U.S.C. §3231. Appellant was tried and convicted on all of the above counts on September 21, 1964. Judgment of conviction was entered on October 23, 1964. The District Court order authorizing appellant to proceed on appeal without prepayment of costs and for appointment of counsel was filed on November 19, 1964. This Court has

jurisdiction upon appeal to review the judgment of the District Court under 18 U.S.C. §1291.

STATEMENT OF THE CASE

Appellant was charged with narcotic violations in a four count indictment filed July 27, 1964.[1] On August 31, 1964, and continuing to September 1, 1964, a Motion to Suppress the Evidence was heard the denied by Judge John J. Sirica. On September 21, 1964, appellant was tried before Judge Burnita S. Matthews and was convicted on all counts of the indictment. During the trial the Motion to Suppress the Evidence was renewed and denied by Judge Matthews. Appellant received prison sentences of one to six years on counts one and three of the indictment and six years each on counts two and four, the sentences to run concurrently. He is currently imprisoned at Lorton, Virginia.

Approximately at 6:00 A.M., Wednesday, June 10, 1964, several police officers assigned to the Gambling and Liquor Squad, Metropolitan Police Department, including Officers Norman Cousin, Herman McNeil, Edward Beman, Clay Goldston and Jack Lockhart (Tr. 15,27), left together in, at least, two cars (T. 15) to an assignment. Their purpose was candidly stated by Officer McNeil:

> Well, on June 10, 1964, I was working with Private Lockhart in the crew on ABC violations.

1 The first and third counts charged a violation of 26 U.S.C. §4704(a) and the second and fourth counts charged a violation of 21 U.S.C. §174.

We were making raids through different premises for violations of the ABC Act (H. 17).

They arrived at 1402 Swann Street, N.W., the private residence wherein appellant was arrested, (H. 11), about 8:05 A.M.

This private home (H.11) was well known to these officers as a place where illegal activities, including the sale of liquor without a licence, were conducted. Detective David Paul, Narcotics Squad, Metropolitan Police Department, who arrived at the premises after appellant's arrest, at about 8:30 A.M. testified:

> Well, it is a place that is run by a man named Shek, and it is raided very often, and there is alot of narcotics in and out of this place, and prostitutes hang out there and frequent it, and alot of bootleg whiskey and games, I guess every type of vice you can imagine goes on in this place, and it is raided very often (H. 40).

Officer Herman McNeil, who had been at this residence several times before and who had participated previously in arrests there (H. 33), explained why they chose this residence.

> Q. And how long had you had the house under surveillance on this occasion, on this particular occasion, that is, that led up to the arrest of Mr. Walker on June 10th?
>
> A. On that morning?
>
> Q. Yes, sir.
>
> A. WELL, IT WASN'T LONG, JUST A FEW MINUTES. WE HAD MADE A COUPLE OF CASES, AND WE NEEDED ANOTHER CASE, SO WE TRIED THAT PLACE, WE KNEW IT (H. 32). (Emphasis added.)

One police officer went to the <u>front</u> door (H. 5). Without

a search or arrest warrant, Officer Cousin entered the premises first through the rear entrance, followed by Officer McNeil (H. 5). He did not knock on the door or request permission to enter. He did not identify himself or announce his authority and purpose (H. 11). Dressed in plain clothes (H. 15), he entered through an "open" door (H. 5,11). Officer Cousin testified:

> I tried the door. The place had been busted many times, I just walked in in an attempt to purchase whiskey, in a place that was running without a license, and I was going to purchase some whiskey (H. 11).

Descriptions of the first floor layout of the residence differed. Officer Cousin testified at the hearing that there are three separate rooms with separate inside doors (H. 4):

He described the rooms as follows:

> . . . (T)here is a small back room when you first entered, and there is a room with a bar where whiskey was being sold, and there is another front room with a couch and so forth (H. 4).

At trial, Officer Cousin testified that there are four rooms on the first floor (T. 26). Officer McNeil described the layout as follows:

> A. ...(T)here are three rooms and a kitchen, and then there is a little hallway that leads to the three rooms, and in this little hallway there is a bar made up where they keep whiskey, and a refrigerator behind the bar, and that is where you walk up to the bar, to purchase and make your buy.

Q. Is the bar in one of the rooms itself, actually?

A. Well, actually there are four rooms with the area where the bar is.

Q. All right. Now, that area, that room - -

A. Five rooms.

Q. Five rooms all together on that one floor?

A. Yes.

(H. 22).

There was no one in the back room, when Officer Cousin entered (H. 6). He then went into another room, which was occupied by one person, Nathaniel Walker (H. 6). With marked money, the property of the Metropolitan Police Department, Officer Cousin purchased one-half pint of whiskey from Nathaniel Walker. This transaction was viewed by Officer McNeil (H.7).

At this point, the record is unclear as to who entered the room next, the appellant or other police officers. Officer McNeil testified that after he saw Officer Cousin give Walker the marked money, he rushed in, signaled for other police officers to enter, and "they rushed in" (H. 18). Officer Cousin testified that Officer Goldston entered the room "seconds" after Officer McNeil gave the signal (H. 7). Officer cousin stated also that after Walker's arrest, he told him to stand by the counter, and "by that time" other police officers had gotten in the premise and recovered the marked money (H. 7). According

to Officer Cousin's testimony at the hearing, "it was a matter of seconds" after Walker's arrest that appellant entered this room, followed by an unidentified girl (H. 8). However, at trial, Officer Cousin testified that it was not until three or four minutes after the arrest of the appellant that other police officers including Officer Goldston, entered the room (T. 27).

Shortly after Walker's arrest, appellant was arrested in the same room. Officer Cousin's account of the arrest at the hearing is as follows:

> Q. What did you say to Smith when he came in the room?
>
> A. Milton Smith came in the room running, and I stopped him and said: What are you running for?
> He said: I heard the word police, and I want to get out of here before I get arrested.
> And I said: What are you doing here?
> He said, I came here to buy my whiskey. I come here often to buy whiskey.
> So immediately after this he attempted to run away, and Officer McNeil was standing in the doorway, and he ran into Officer McNeil, and I caught him by the shoulder, and I told him I placed him under arrest for being present in an illegal establishment (H. 8).

However, at trial Officer Cousin testified that appellant did not look suspicious to him when appellant ran into the room or when appellant was running past him, or at any time before his arrest (T. 23).

Officer McNeil's account of the arrest is as follows: Appellant ran out of one of the rooms in a very suspicious manner (H. 25). Officer Cousin grabbed appellant and asked him why he

was in such a hurry. Appellant replied that he heard the police were there, and he didn't want to be arrested. Officer McNeil could not testify to what was then said between Officer Cousin and appellant because he was . . . standing . . . in the doorway of the kitchen, on the telephone, calling the Sergeant, telling him to proceed on to these premises (H. 25)." Then, according to Officer McNeil, appellant ". . . tried to run over me . . . and I PUSHED HIM BACK WITHIN THE ROOM (H. 26)." (Emphasis added.) He gave the following explanation for his action:

> Why, because we never let anybody out of the premises until we have recovered the money, the marked money that was used, the Metropolitan D.C. funds that were used to purchase it by (H. 26).

Then, Officer Cousin grabbed appellant and told him he was under arrest (H. 28). In Officer McNeil's presence appellant was then searched by Officer Cousin and two plastic vials containing suspected narcotics were found. Officer Cousin asked appellant where he obtained these items. Appellant gave conflicting explanations (H. 29). Officer McNeil then testified:

> So, you know, Officer Cousin asked him what he was doing in there, and he said he used to come there all the time, that is where he buys his whiskey.
>
> Q. This was all AFTER the arrest? (Emphasis added).
>
> A. Yes, sir. (H. 28).

Appellant was arrested a second time on June 18, 1964, at

1338 Monroe Street, N.W., at approximately 2:00 A.M. (H. 51). Detective Robert T. Keahon, Robbery Squad, Metropolitan Police Department, testified that on June 17, 1964, at about 7:30 A.M., a telephone call from Miss Lillian Hicks and four others was received by the police dispatcher. They complained of a robbery (H. 44, 45). Police from No. 10 precinct drove them to the Robbery Squad office. In the afternoon of that day a warrant for the arrest of appellant was issued. The complaint was signed by Miss Lillian Hicks (H. 45). The warrant was placed in a file inside a filing cabinet in the Robbery Squad Office. Officer Keahon testified that this warrant remained in the Robbery Squad office until shortly before appellant's arraignment on the morning of June 18, 1964, or until about 8:30 or 9:00 A.M., at which time it was shown to appellant and he was informed of the purpose of his arrest (H. 47).

Lieutenant Edwin J. Ruff, Metropolitan Police Department, testified that while in charge of No. 10 Precinct on June 18, 1964, he learned of an outstanding arrest warrant for appellant from Officer Simmons. He testified that Officer Simmons had telephoned the Robbery Squad office about 1:00 A.M. and was told that the arrest warrant was there but that it wasn't available at the moment (H. 59).

Officer William A. Best, Jr., Metropolitan Police Department, testified that at about 1:00 A.M., June 18, 1965, he and his

partner, Officer Sebron Ison, were assigned by Lieutenant Ruff to proceed to 1338 Monroe Street, N.W., the apartment of Miss Lillian Nicks, and arrest appellant, if he appeared. Arriving there at about 1:30 A.M., they waited inside the apartment. At approximately 2:00 A.M. appellant arrived and was arrested. Officer Ison told appellant that he was under arrest for robbery (H. 52, T. 48). Appellant was "placed" on the floor (T. 50) and was searched. A manila envelope containing whitepowder capsules was taken from his left leg stocking (T. 53).

The Motion to Suppress the Evidence from these two arrests was denied and appellant was found guilty on all counts of the indictment.

STATUTES INVOLVED 1/

1/ See Appendix for quoted portions of relevant statutes.

STATEMENT OF POINTS

Appellant intends to rely on the following points in this appeal:

1. It was reversible error for the court below to deny appellant's motion to suppress the evidence obtained as a result of the arrest of June 10, 1964, without an arrest or search warrant, and without probable cause to arrest without a warrant, in violation of the Fourth Amendment to the Constitution of the United States because:

a. A private residence, known to members of the Gambling and Liquor Squad as a place where illegal liquor was sold, was entered without an arrest or search warrant, as one of a series of raids, undertaken at an early hour of the morning, to seize illegal liquor.

b. The entry into a private residence was made in an unlawful manner and the evidence obtained from inside the residence was the fruit of the unlawful entry.

c. There was not a sufficient basis to arrest appellant for a misdemeanor, without an arrest warrant, assuming there was no requirement to obtain an arrest or search warrant prior to entering the premises.

With respect to Point I, appellant desires the Court to read the following pages of the Transcript: H. 5,8,11,17,25-26,32-33,40.

2. It was reversible error for the court below to deny appellant's motion to suppress the evidence obtained as a result of the arrest of June 18, 1964, because the arrest was executed in an unlawful manner, contrary to 4(c)(3) of the Federal Rules of Criminal Procedure.

(a) The arrest warrant was at the Robbery Squad Office at the time of the arrest, and its location known to Lieutenant Ruff, who ordered Officers Best and Ison to arrest appellant, and because failure to obtain the arrest warrant and to execute it at the time of the arrest was the result of mere inconvenience or inexcusable neglect.

b. The arrest, without obtaining and executing the arrest warrant, was made without informing appellant at the time of his arrest of the existence of a valid arrest warrant.

With respect to Point II, appellant desires the Court to read the following pages of the transcript: H. 52,59.

SUMMARY OF ARGUMENT

I. Appellant's motion to suppress the evidence obtained as a result of the arrest of June 10, 1964, should have been granted. The District of Columbia Alcoholic Beverage Control Act, providing at 25 D.C.C. 129 for obtaining search warrants to seize liquor sold without a license, was violated by the admitted "raid", without an arrest or search warrant, of 1402 Swann Street, N. W., a private residence. Officers of the Gambling and Liquor Squad, having "made" two cases between approximately 6:00 and 8:00 a.m. and needing another case, went to this residence because it was well known to them as a place where illegal liquor was sold.

Arriving there about 8:05 a.m. the police officers, with virtually no delay for surveillance, stationed one member at the front of the premises, while Officer Cousin, dressed in plain clothes, illegally entered through the rear entrance, followed by Officer McNeil, without first knocking on the door, or announcing their authority and purpose. No one was present in the room into which they entered to attempt to prevent their entry, or, at least to object. The arrest of appellant inside the premises, shortly after a purchase by Officer Cousin of one-half pint of liquor from Nathaniel Walker, and the subsequent search and discovery of narcotic capsules in appellant's possession were the fruits

of this illegal entry.

The arrest of appellant itself was made without a sufficient basis to arrest for the misdemeanor, 22 D.C.C. 1515, Presence in an Illegal Establishment. The arrest of appellant occurred when appellant attempted to leave the premises and was "pushed back" into the room by Officer McNeil. This restraint of appellant's liberty occurred only because appellant ran out of one of the rooms in a "very suspicious manner" and because "... we never let anybody out of the premises until we have recovered the (marked) money...." Officer McNeil did not hear the incriminating statement, if any, which was made by appellant to Officer Cousin prior to the arrest - Officer McNeil testified that he heard this conversation after the arrest and search had occurred - because he was on the telephone requesting a Sergeant to proceed to these premises. Therefore, no crime had occurred within his presence or view.

Even if the arrest did not occur until Officer Cousin placed his hand on appellant's shoulder, Officer Cousin did not have a sufficient basis to arrest for a misdemeanor. Assuming appellant made the alleged incriminating statement, that he was there to purchase liquor prior to his arrest, the requirement of 22 D.C.C.1515 that presence in the establishment must be with knowledge that the liquor sold is sold illegally was not met.

II Appellant's motion to suppress the evidence obtained as a result of the arrest of June 18, 1964, should have been granted. Rule 4(c)(3) of the Federal Rules of Criminal Procedure was violated by the illegal execution of the arrest. First, the arresting officer should have had the arrest warrant in his possession at the time of arrest. Rule 4(c)(3) should be read in light of the purposes that the rule was intended to serve, as officially expressed in the Notes of the United States Supreme Court Advisory Committee on Rules of Criminal Procedure. It was never intended to justify failure of the arresting officer to possess the warrant at the time of arrest where, as here, the arrest warrant was in the same jurisdiction, at the Robbery Squad Office, its location known to Lieutenant Ruff, who ordered Officers Best and Ison to arrest appellant, and where failure to obtain the arrest warrant and execute it at the time of the arrest was the result of mere inconvenience or inexcusable neglect.

Second, Rule 4(c)(3) was violated because the arrest of appellant, without obtaining and executing the arrest warrant, was made without informing appellant at the time of his arrest of the existence of a valid arrest warrant. The envelope taken from appellant's sock when he was "placed" on the floor, containing a narcotic substance, was the fruit of

this illegally executed arrest.

Therefore, these errors below necessitate a new trial or other appropriate remedy.

ARGUMENT

I.

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF THE ARREST OF JUNE 10, 1965, BECAUSE THE ARREST WAS MADE WITHOUT A SUFFICIENT BASIS TO ARREST FOR A MISDEMEANOR WITHOUT A WARRANT IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

A. BECAUSE A PRIVATE RESIDENCE, KNOWN TO MEMBERS OF THE GAMBLING AND LIQUOR SQUAD AS A PLACE WHERE ILLEGAL LIQUOR WAS SOLD, WAS ENTERED WITHOUT AN ARREST OR SEARCH WARRANT, AS ONE OF A SERIES OF RAIDS, UNDERTAKEN AT AN EARLY HOUR OF THE MORNING, TO SEIZE ILLEGAL LIQUOR.

The District of Columbia Alcoholic Beverage Control Act
Act, Title 25, D. C. C. at 1089 et. seq. (1961 edition), prohibits the sale of alcoholic beverages without a license.[1/] Criminal sanctions are provided for violation of this prohibition. See 25 D. C. C. 132. Persons not directly involved in the sale of alcoholic beverages

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1/ Subject to certain exceptions 25 D. C. C. §109.

without a license may also be subject to criminal sanctions. For example, presence in an establishment where "intoxicating liquor is sold without a license" with knowledge that it was "such an establishment" and failure to give a "good account" of such presence is a misdemeanor. 22 D.C.C. 1515. Because of the criminal sanctions involved, and because the sale of alcoholic beverages without a license commonly occurs in premises falling within the protection of the Fourth Amendment, the statute sets out in clear and specific terms procedures for police enforcement of the prohibition. Section 129 of Title 25 of the District of Columbia Code provides for the obtaining of a search warrant ". . . when any alcoholic beverages are manufactured for sale,kept for sale, sold, or consumed in violation of the provisions of this chapter" and ". . . such alcoholic beverages may be taken on the warrant from any house or other place in which it is concealed." (See Appendix for relevant portions of this section.)

The requirements for obtaining a search warrant under 25 D.C.C. 129 to search for and seize alcoholic beverages sold in violation of the Alcoholic Beverage Control Act seem to impose a greater burden upon law enforcement officers than does 23 D.C.C. 301, the statute providing for the issuance of search warrants generally. (See Appendix). Indeed, 25 D.C.C. 129 (c),

which requires the judge or commissioner, before issuing the warrant, to examine en oath the complainant and any witnesses he may produce, and require their affidavits or take thier dispositions in writing, seems to impose a stricter standard than is required by the Fourth Amendment provision that ". . . no warrants shall issue but upon probable cause supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This no doubt reflects the policy that "raids" by police officers into private premises to search for and seize alcoholic beverages, allegedly being sold in violation of the Alcoholic Beverage Control Act, are not to be generally encouraged by the law, but are to be undertaken only after an impartial and legally skilled official, that is, a Court of General Sessions Judge or the United States Commissioner has scrutinized the particular evidence and concluded that a search warrant should issue.

Even apart from this, it is well established in the law that where private premises, as distinguished from moving vehicles, are the subject of a police entry for the purposes of an arrest or search, an arrest or search warrant is required, unless there are special circumstances which justify dispensing with a warrant. In Agnello v. United States, 269 U.S. 20 (1925), the Supreme Court stated:

> ". . . one s house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein.... Belief, however well founded, that an article is concealed in a dwelling house furnishes no justification for a search of that place without a warrant and such searches are . . . unlawful notwithstanding facts unquestionably showing probable cause." Id. at 32-33.

More recently, in Chapman v. United States, 365 U.S. 610 (1960), where petitioner's rented room was searched with the consent of the landlord after police officers smelled the odor of whiskey mash on the premises, the Supreme Court stated:

> "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate....We think it must be concluded here. . . that if the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." Id. at 615-616.

See also, Taylor v. United States, 286 U.S. 1 (1932); Johnson v. United States, 333 U.S. 10 (1948); McDonald v. United States, 335 U.S. 451 (1948); United States v. Jeffers, 342 U.S. 48 (1951), Stoner v. California, 376 U.S. 483 (1964). Baxter v. United States, 188 F.2d 119 (6th Cir. 1951). But cf. United States v. Rabinowitz, 339 U.S. 56 (1950).

In our own Court of Appeals, there are the excellent opinions of then Chief Judge Prettyman in Accarino v. United States, 85 U.S. App. D.C. 394, 179 F.2d 456 (1949).

and Morrison v. United States, 104 U.S. App. D.C. 352, 262 F.2 449 (1958). In Morrison, Judge Prettyman stated: "In Accarino we spelled out in detail the proposition that a search of a home without a warrant cannot be based merely on probably cause, that there must be some additional circumstance reasonably necessitating quick action." 104 U.S. App. at 356.

The facts of the case at bar make it an especially strong case to find that appellant's Fourth Amendment rights were violated because of failure to obtain a search warrant. The crucial point here is that the police did not come to 1402 Swann Street, N.W. and enter the premises to investigate, in order to collect evidence to use as a basis for later obtaining a search or arrest warrant and then, observing a misdemeanor committed in their presence, arrest immediately to prevent the suspect from disappearing or to prevent the destruction of evidence. Instead, the record shows the following:

1. Several officers from the Gambling and Liquor Squad operating as a group "made" at least two cases within approximately two hours before arriving at 1402 Swann Street, N.W. (H. 32).

2. The uncontradicted testimony of Officer McNeil was that the purpose of their activities on June 10, 1965, was to make "raids" for violations of the Alcoholic Beverage Control Act (H. 17). The fact that their work began that day, a Wednesday, at 6:00 A.M., an early and unusual hour for any business serving the

public, including an illegally operated business, is independent evidence that their purpose was not merely for investigation, but primarily to search for and seize illegal liquor, and, perhaps, to arrest persons found to be violating the law.

3. The residence, 1402 Swann Street, N.W., was well known to members of the Gambling and Liquor Squad as a place where liquor was sold without a license. At least one of the officers participating on the "raid" had been there several times before and had participated in pervious arrests. (H. 11, 32, 33, 40).

4. The reason the police included 1402 Swann Street, N.W. among their raids that morning was, in the words of Officer McNeil, because ". . . we needed another case, so we tried that place, we knew it" (H. 32).

5. The front entrance to 1442 Swann Street, N.W., apparently was covered by a police officer, when Officer Cousin entered from the rear (H. 5), leaving no means of exit for any persons inside.

6. The total period of surveillance on June 10, 1965, before the residence was entered was only a few minutes (H. 32).

7. Before entering the premises the officers did not have the names of any specific persons whom they intended to arrest. Thus, a fortiorari, Judge Prettyman's analysis in the Morrison case, is applicable:

> The officers entered the house to make a search. It was, to be sure, a search for a person rather than the usual search for an article of property, but it was a search.... It is true they intended to arrest him if they found him, and so the ultimate objective was an arrest. The Government urges that this latter fact requires that we apply the rules of law pertaining to arrest rather than the rules governing search. BUT THE SEARCH WAS A FACTUAL PREREQUISITE TO AN ARREST; IT WAS THE FIRST OBJECTIVE OF THE ENTRY; the officers did in fact search the house. They entered to make a search as a necessary prerequisite to possible arrest. 104 U.S. App. at 355. (Emphasis added).

Given the above facts, the "buy" transaction was actually incident to a police search, and not vice versa. Once the police had come in a group, blocked off exits to the premises, and entered a place known to them to contain liquor sold without a license, with the purpose of making a "raid", it is submitted that it is too late for an otherwise valid "buy" transaction to cure the illegal search. This argument may be tested by a hypothetical question: Suppose Officer Cousin having entered the room in which the "buy" was made, observed the liquor, but no "bartender" was present. Would he and Officer McNeil have then turned around and left the premises, with the other police officers withdrawing from the scene? It is submitted that such a course of action would have been highly unlikely.

It is clear that the "buy" transaction which took place between Officer Cousin and Nathanial Walker is far different from "buy" transactions in other cases which may be viewed as examples of good police work. See Williams v. District of Columbia, 167

A.2d 803 (1961) and United States v. White, 122 F. Supp. 664 (1954), which show proper and effective use of "buy" transactions in the enforcement of the Alcoholic Beverage Control Act. In both cases search warrants were obtained. The Williams and White cases clearly show that effective law enforcement of the Alcoholic Beverage Control Act will not be unduly handicapped by suppressing evidence obtained by arrests pursuant to police raids without arrest or search warrants, such as in the case at bar.

B. BECAUSE THE ENTRY INTO A PRIVATE RESIDENCE WAS MADE IN AN UNLAWFUL MANNER AND THE EVIDENCE OBTAINED FROM INSIDE THE RESIDENCE WAS THE FRUIT OF THE UNLAWFUL ENTRY.

It is submitted that Nueslein v. District of Columbia 73 App. 85, 115 F.2d 690 (1940) is controlling. In Nueslein police officers were investigating a report that a taxicab struck a parked car and left the scene. A block and one-half away the officers saw a parked taxicab and saw the registration card and character license of the owner. Without an arrest or search warrant, they went to the owner's home, knocked at the door and received no reply. Then, they either opened the door or passed through the door already opened, and entered the home. Inside the home the taxicab owner made incriminating statements. On the basis of these statements and observations of his demeanor, he was placed under arrest and was later convicted for driving an automobile while under the influence of alcohol. The Court of Appeals reversed his conviction

and held that the officer's testimony, regarding the defendant's statements voluntarily made within his home, was inadmissible because of the unlawful entry. The Court rejected the argument that there was consent to the entry of the police officers: "In the instant case it is difficult to find the time when it would have been appropriate for the defendant to resist, acquiesce in, or invite the illegal search. He never had a chance to meet the officers at the door." Id. at 89. (Emphasis added). Nueslein was cited with approval by the Supreme Court in Wong Sun v. United States, 371 U.S. 471, 486, (1963). Work v. United States, 100 U.S. App. D.C. 237, 243 F.2d 660 (1957); McDonald v. United States, 335 U.S. 451 (1948).

As in Nueslein, neither Nathaniel Walker or appellant had an opportunity to acquiesce in the entry. The room into which Officer Cousin and Officer McNeil entered was unoccupied (H. 6). Unlike Nueslein, in the case at bar the police officers did not even first knock on the door and wait for a reply (H. 11). Nor did they enter the premises from the front door. Instead, they placed an officer at the front door and went to the rear entrance. At approximately 8:05 A.M., it was unlikely that anyone including the "bartender", Nathaniel Walker, would observe their entry. In this manner, Officer Cousin, who apparently was familiar with the back door entrance (H. 11), was able to enter and, dressed in plain clothes, purchase one-half pint of liquor from Nathaniel

Walker. Apparently, the police officers believed that this stealth and subterfuge was necessary in order to gain entrance to the premises and once inside and observing Nathaniel Walker, to gain his confidence sufficiently to make the "buy".

In addition, appellant contends that failure of police officers to announce their authority and purpose before entering the premises also makes their entry unlawful. Before Officer Cousin entered, he did not identify himself orrannounce his authority and purpose (H. 11); nor did Officer McNeil, whose entry shortly followed. The requirement of prior notice is strictly construed. In Miller v. United States, 357 U.S. 301 (1958), the Supreme Court said: "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application." Id., note 204, at 313. In Miller the requirements of 18 U.S.C. 3109 were held to apply to an entry for the purpose of effecting an arrest without a warrant. In Gatlin v. United States, ____ U.S. App. D.C. ____, 326 F.2d 666 (1963), the Court of Appeals held that the fact that the search was made without warrant does not eliminate necessity of complaince with 18 U.S.C. 3109. Cf. Wong Sun v. United States, 371 U.S. 471 (1963); Accarino v. United States, 85 U.S. App. D.C. 394, 179 F.2d 456 (1949); Hair v. United States, 110 U.S. App. D.C. 155, 289 F.2d 894 (1961); Keiningham v. United States, 109 U.S. App. D.C. 272, 287 F.2d 126 (1960). Even if the police

officers obtained a search warrant under 25 D.C.C. 129, failure to announce authority and purpose prior to entry would be a specific violation of 25 D.C.C. 129 (g). Compare 25 D.C.C. 129 (g) with 18 U.S.C. 3109.

Since the Keiningham case, the rule has been clear in the District of Columbia that the word "break" as used in 18 U.S.C. 3109 means "enter without permission". The Court stated: "We think that a 'peaceful entry' which does not violate the provisions of §3109 must be a permissive one, and not merely one which does not result in the breaking of parts of the house." Id. 276, 287 F.2d at 130: The court disregarded previous cases which suggested a distinction between a locked and unlocked door because "a person's right to privacy in his home . . . is governed by something more than the fortuitous circumstance of an unlocked door...." Id. In the case at bar, as in Keiningham, the entry was a peaceful one. While Officer Cousin testified he entered through an "open" door (H. 5,11), his testimony that he "tried the door" and "just walked in" (H.11) indicates that the door was closed but unlocked. However, even if the door was wide open, unless it could be shown that this constituted an invitation to enter, it is submitted that the invasion of the right of privacy is no less great, especially, here, where a back entrance was entered.

Also, it has long been recognized that entry by stealth can be as unlawful as entry by illegal use of force. See Gouled v. United States, 255 U.S. 298 (1921); Gatewood v. United States,

93 U.S. App. D.C. 226 (1953) and the dissenting opinion of Judge Edgerton (with whom Judges Bazelon, Fahy and Washington join) in Jones v. United States, 113 U.S. App. D.C. 14 (1962). Here, the time of entry - about 8:05 A.M., the dress of the police officers - plain clothes, the manner of entry - the back door, considered in light of the officer's knowledge of the premises and their purpose of their visit is a form of stealth and subterfuge somewhat anologous to Gatewood, where a police officer represented himself to be from "Western Union" in order to gain entrance, in contrast to Jones, where the police officer's conducts was passive, consisting of remaining silent while a janitor replied "janitor" in response to the question, "Who's there?"

C. BECAUSE THERE WAS NOT A SUFFICIENT BASIS TO ARREST APPELLANT FOR A MISDEMEANOR, WITHOUT AN ARREST WARRANT, ASSUMING THERE WAS NO REQUIREMENT TO OBTAIN AN ARREST OR SEARCH WARRANT PRIOR TO ENTERING THE PREMISES.

1. THE POINT OF ARREST OCCURED WHEN OFFICER MCNEIL PUSHED APPELLANT BACK INTO THE ROOM, BARRING HIS EXIT, AND AT THIS TIME OFFICER MCNEIL LACKED A SUFFICIENT BASIS TO ARREST FOR A MISDEMEANOR.

In Henry v. United States, 361 U.S. 98 (1960), F.B.I. agents investigating a theft observed defendants place certain cartons in their car, followed them, and then waved the car to a stop. The Supreme Court, in reference to the point at which the arrest occurred, which the Government conceded, stated: "When the officers interrupted the two men and restricted their liberty of

movement, the arrest, for purposes of this case, was complete." Id. at 103. In Kelley v. United States, 111 U.S. App. D.C. 396, 298 F.2d 310 (1961), the Court of Appeals stated:

> (I)n order for there to be an arrest it is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest. It is sufficient if the person arrested understands that he is in the power of the one arresting, and submits in consequence. Id. at 398, 298 F.2d at 312. (Emp asis added).

See Seals v. United States, 117 U.S. App. D.C. 79, 325 F.2d 1006 (1963), United States v. Nicholas, 319 F.2d 697 (2nd Circuit, 1963), United States v. Viale, 312 F.2d 595 (2nd Circuit, 1963), United States v. Viale, 312 F.2d 595 (2nd Circuit, 1963). In Morton v. United States, 79 U.S. App. D.C. 329, 147 F.2d 28 (1945), the Court of Appeals quoted from Long v. Ansell, 63 App. D.C. 68, 71, as follows: ". . . the term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time." Id. at 30, fn. 7.

Applying the criteria of the above cases, it is submitted that appellant was arrested, at least , when Officer McNeil pushed appellant back into the room. Officer McNeil clearly intended to restrain appellant's liberty (H. 26). It would be difficult to conclude that at this point appellant did not feel that he was under arrest, because, according to the testimony of Officer

Cousin, a moment earlier appellant had expressed his fear of being arrested to Officer Cousin, expressed his desire to leave the premises, and, in fact, ran (H. 8). At the point Officer McNeil pushed him back into the room, appellant was no longer free to leave.

Assuming that the arrest occurred at this point, it is submitted that Officer McNeil did not have a sufficient basis to arrest for a misdemeanor, without a warrant, for the offense of 22 D.C.C. 1515, Presence in an Illegal Establishment.

In the District of Columbia, as at common law, the rule is settled that a police officer may not arrest for a misdemeanor without a warrant, unless it is committed in his presence or within his view. Maghan v. Jerome, 67 App. D.C. 9, 10, 88 F.2d 1001, 1002, (1937). Accord, Stephens v. United States, 106 U.S. App. D.C. 169, 271 F.2d 832 (1959); Darnall v. United States, 33 A.2d 734 (1943). See 4 D.C.C. 140. This requirement, of course, imposes a heavier burden upon police than an arrest for a felony without a warrant. 1/

1 To arrest for a felony, police officer need only have probable cause to believe that a felony has been committed and that the arrested person committed it. Smith v. United States, 103 U.S. App. D.C. 48, 50, 254 F.2d 751, 753 (1958). Probable cause exists where the facts and circumstances within the police officer's knowledge and of which he had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been, or is being committed. Brinegar v. United States, 338 U.S. 160 (1940). See Bell v. United States, 102 U.S. App. D.C. 383, 254 F.2d 82, cert. denied, 358 U.S. 885 (1958).

Officer McNeil testified that appellant ran out of one of the rooms in a very suspicious manner (H. 25). When appellant was stopped by Officer Cousin and a conversation ensued between them, Officer McNeil testified that he heard Officer Cousin ask appellant why he was in such a hurry. Officer McNeil heard appellant reply that he heard that the police were there, and he didn't want to be arrested. However, Officer McNeil could not testify to the remainder, if any, of the conversation between Officer Cousin and appellant because he was ". . .standing (in) the kitchen, in the doorway of the kitchen, on the telephone, calling the Sergeant, telling him to proceed on to these premises" (H. 25). On the basis of this testimony, it may be presumed that Officer McNeil did not hear any conversation that may then have occurred between Officer Cousin and appellant. Appellant then ran for the door and Officer McNeil pushed him back within the room ". . . because we never let anybody out of the premises until we have recovered the money, the marked money that was used . . . to purchase it by" (H. 26). It is submitted that on the basis of this knowledge, Officer McNeil did not even have probable cause to arrest appellant for violation of 22 D.C.C. 1515, and a fortiori did not see the crime committed within his presence or within his view. Even for a felony, a police officer may not arrest upon mere suspicion. Mallory v. United States, 354 U.S. 449, 454 (1957).

2. ASSUMING THE ARREST DID NOT OCCUR UNTIL OFFICER COUSIN PLACED HIS HAND ON APPELLANT'S SHOULDER, OFFICER COUSIN DID NOT HAVE A SUFFICIENT BASIS TO ARREST APPELLANT FOR A MISDEMEANOR, WITHOUT A WARRANT.

The crime of Presence in an Illegal Establishment, 22 D.C.C. 1515, has three separate elements: (1) presence in an establishment where intoxicating liquor is sold without a license; (2) knowledge that it is an establishment where intoxicating liquor is sold without a license; (3) failure to give a good account of presence in the establishment. (See Appendix for the entire provision). The facts testified to by Officer Cousin, as the basis for the arrest of appellant are quoted, supra, at p. . This testimony was contradicted by Officer McNeil's testimony, which was that it was after appellant's arrest that he stated that he buys liquor there. See supra, p. . Assuming that the court below accepted Officer Cousin's version of the facts, it is submitted that this information is an insufficient basis for belief that a violation of 22 D.C.C. 1515 was committed in his presence or within his view. Appellant was not present in the room when the "buy" occurred. At the early hour of the morning, he heard the word, "police" and came running through the room. Officer Cousin stopped him and asked two questions: (1) What are you running for? (2) What are you doing here? Conceding that appellants answer and the circumstance of his flight may

constitute failure to give a "good account" of his presence in the establishment, Officer Cousin did not have sufficient information to conclude that the second element, supra, requiring scienter, was met. Congress did not intend that every person found in an illegal establishment, who could not meet the burden of giving a "good account" of their presence, should be found guilty of a crime. They required that a person have actual knowledge that the liquor sold was being sold without a license. Officer Cousin did not inquire as to the existence of this element and, therefore, the crime was not, in fact, committed within his presence or within his view. If 22 D.C.C. 1515 were a felony, perhaps appellant's replies plus his conduct amounted to probable cause for Officer Cousin to arrest. But the law requires much more to arrest for a misdemeanor without a warrant.

II. THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM THE ARREST OF JUNE 18, 1964, BECAUSE THE ARREST WAS EXECUTED IN AN UNLAWFUL MANNER, CONTRARY TO 4(c)(3) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE:

A. BECAUSE THE ARREST WARRANT WAS AT THE ROBBERY SQUAD OFFICE AT THE TIME OF THE ARREST, AND ITS LOCATION KNOWN TO LIEUTENANT RUFF, WHO ORDERED OFFICERS BEST AND ISON TO ARREST APPELLANT, AND BECAUSE FAILURE TO OBTAIN THE ARREST WARRANT AND TO EXECUTE IT AT THE TIME OF THE ARREST WAS THE RESULT OF MERE INCONVENIENCE OR INEXCUSABLE NEGLECT.

Title 18, U.S.C.A., Federal Rules of Criminal Procedure, Rule 4(c)(3) provides:

Rule 4. Warrant or Summons upon Complaint.

. . .
(c) Execution or Service; and Return.
. . .
(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest. but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued....

The authoritative guide to the intended meaning of the above provision may be found in the official notes of the Committee on the Federal Rules of Criminal Procedure The "Note to Subdivision (c)(3)" states:

> 1 The provision that the arresting officer need not have the warrant in his possession at the time of the arrest is rendered necessary by the fact that a fugitive may be discovered and apprehended by any one of many officers. It is obviously impossible for a warrant to be in the possession of every officer who is searching for a fugitive or who unexpectedly might find himself in a position to apprehend the fugitive. The rule sets forth the customary practice in such matters, which has the sanction of the courts. "It would be a strong proposition in an ordinary felony case to say that a fugitive from justice for whom a copias or warrant was outstanding could not be apprehended until the apprehending officer had physical possession of the copias or the warrant. If such were the law, criminals could circulate freely from one end of the land to the other, because they could always keep ahead of an officer with the warrant." In re Kosopud, Ohio, 272 F. 330, 336. Waite, 27 Jour. of Am. Judicature Soc. 101, 103. The rule, however, safeguards the defendant's rights in such case. Id. at 111, 112.

The notes of the Advisory Committee explaining the reason for not requiring possession of the warrant have been referred to

in applying the rule. Butler v. United States, 191 F.2d 433, 438 (4th Cir. 1951); United States v. Jackson, 22 F.R.D. 38 (S.D. New York, 1958).

The article referred to in the above note, Waite, "The Proposed Federal Rules of Criminal Procedure," 27 Journal of the American Judicature Society 101 (December, 1943) comments on Rule (c) (2) and (3):

> Another innovation in respect of arrest. . . which should reduce the delays of enforcement, is the provision (Rules 4 and 9) that a warrant for arrest properly issued in one district may be executed anywhere within the jurisdiction of the United States. The purposeless nuisance and time consumption of getting fresh warrants along the trail of a migratory crook is thus eliminated. The related provision (Rules 4 and 9) that the officer arresting by authority of a warrant need not have it in his possession at the time, though he must show it as soon thereafter as possible, has precedent in state statutes as well as in the Institute Code, and, by broadening the number of officers in a position to arrest pursuant to the warrant, should facilitate reasonable and effective enforcement. Id. at 103.

The above sources indicate that Rule 4(c)(3) was intended to operate in three types of situations: (1) Where the suspected criminal has gone into another jurisdiction and the time required to obtain the warrant might enable him to avoid arrest. (2) Where an officer unexpectedly finds himself in a position to arrest a criminal suspect, knowing that a warrant is outstanding, or where several officers work together to make an arrest, and the officer actually making the arrest is

not the one in possession of the warrant. Most, if not all, of the decided cases in which this issue has been raised seem to fall within these two categories. Cf. Butler v. United States, 191 F.2d 433 (4th Cir. 1951); United States v. Donnelly, 179 F.2d 227 (7th Cir. 1959); United States v. Jackson, 22 F.R.D. 38 (S.D. New York, 1958); In re Kosopud et al, 272 F. 330 (N.D. Ohio, E.D. 1920); But see, United States v. Petti, 168 F.2d 221 (2nd Cir. 1948), and United States v. Macri, 185 F. Supp. 144 (D. Conn. 1960), in which the facts do not show where the warrant was issued.

The reason that the Advisory Committee's Note explains Rule 4(c)(3) in terms of the above two situations stems from concern for the rights of the defendant, as reflected in the case law and from communications to the Advisory Committee. In 40 A.L.R. 62, Annotation, "Necessity of showing warrant upon making arrest under warrant," it is stated:

> The weight of authority now, however, seems to support the proposition that an officer making an arrest under a warrant should show the warrant, if requested to do so, and in some jurisdictions he is expressly required by statute to do so.

See United States ex rel. Roberts v. Jailer of Fayette County 2 Abb. (U.S.) 265, Fed. Cas. No. 15,463 (1867); O'Halloran et. al. v. McGuirk, 167 F. 493 (1st Cir. 1909). If an officer may be required to show the warrant upon request at the time of arrest, a fortiori, he must have the warrant in his possession,

or have immediate access to the warrant. Lester B. Orfield, a member of the Advisory Committee, in "Warrant of Arrest and Summons Upon Complaint in Federal Criminal Procedure," 27 University of Cincinnati Law Review 1 (Winter, 1958), citing 1 Comments, Recommendations and Suggestions Received Concerning The Proposed Federal Rules of Criminal Procedure (1943), stated:

> With respect to Rule 4(c)(3), Judges John E. Miller of Arkansas, Merrill E. Otis of Missouri, and C.C. Wyche of South Carolina thought the rule undesirable in permitting an officer to arrest without having the warrant in his possession.... Robert Kingsley of the University of Southern California believed that the officer should have the warrant in his possession at the time of arrest. The defendant is entitled to know by what authority he is arrested. If that authority be a warrant, he is entitled to examine it to find out whether he is required to submit to arrest. The defendant might then come to a mistaken conclusion and refuse to submit, but that is his worry, and he should be given the evidence so that he may make his choice....Robert M. Hitchcock of Dunkirk, New York, insisted on possession of the warrant, stating that otherwise 'the door is left open for imposters.' Id. at 14, 15.
>
> . . .
>
> With respect to Rule 4(c)(3), the special Committee of the Los Angeles Bar Association objected to the provision that the officer need not have the warrant in his possession at the time of arrest. It would lead to multiple and vexatious arrests. The Committee of the State Bar of California took the same position. Id. at 16.[1]

In the case at bar, the arrest warrant was obtained in the same jurisdiction in which appellant was arrested. Its location was known to Lieutenant Ruff, who ordered Officers Best and

1 Cf. Williams, Requisites of a Valid Arrest, 1954 Crim.L.Rev.15.

Ison to arrest appellant. It is submitted that the telephone call made to the Robbery Squad Office and the reply that the warrant was not available at the moment (H. 29) does not excuse failure to obtain possession of the warrant. The inconvenience and, perhaps, slight delay required to obtain the warrant would not place an undue burden on the police, especially, as here, where the police had received advance information that appellant would appear at 1338 Monroe Street, N.W. and officers were assigned to that location to wait for him. In these circumstances, surely a citizen is entitled to examine the warrant at the time of arrest to obtain notice of the authority for the arrest and to receive notice of the information contained therein.

B. BECAUSE THE ARREST, WITHOUT OBTAINING AND EXECUTING THE ARREST WARRANT, WAS MADE WITHOUT INFORMING APPELLANT AT THE TIME OF ARREST OF THE EXISTENCE OF A VALID ARREST WARRANT.

Rule 4(c)(3), supra. p. , provides that if the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. If this requirement was not met, then the court below erred in denying appellant's motion to suppress the evidence obtained from his second arrest.

At the hearing, counsel asked the following question and Officer Best replied:

Q. What did Mr. Ison tell him (appellant) he was under arrest for?

A. He said he was under arrest for robbery (H. 52). There was no testimony that defendant was informed at the time of his arrest that an arrest warrant had been issued. It is submitted that an inference should be drawn from the above question and answer that, in fact, appellant was not informed of the fact that a warrant had been issued. Alternatively, it is submitted that once the issue of the legality of the arrest had been raised by appellant, the Government had the burden to establish that the requirements of Rule 4(c)(3) were complied with.[1/]

If the Court rejects the above two contentions that this issue is raised by the record below, appellant requests that the case be remanded for a hearing for the limited purpose of determining what statements were made to appellant at the time of his arrest. Since appellant's conviction on counts three and four rest almost entirely upon admission into evidence of the narcotics seized after his arrest of June 18, 1965, which turns upon the legality of the execution of the arrest, it is submitted that this issue is crucial to appellant's right to a fair trial.

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1 Cf. Wrightson v. United States, 95 U.S. App. D.C. 390, 222 F.2d 556 (1955), in which the Court of Appeals said that ". . . The same obvious conclusion (that police would never get a warrant) follows if the courts, when an arrest is attacked as illegal, will assume, without facts, that an arrest without a warrant was for probable cause." Id. at 394. Gatlin v. United States, 326 F.2d 666 at 671 n.10 relating to the arrest of the co-defendant without a warrant: "Certainly the absence of a warrant does not relieve the Government from proving probable cause for the arrest" then citing the above language in Wrightson.

CONCLUSION

WHEREFORE, appellant respectfully requests this Court to reverse the judgment of conviction below and remand the case for a new trial, or other appropriate remedy.

Respectfully submitted,

William W. Greenhalgh
William B. Martin
Jefferson D. Kirby, III
Marvin J. Brenner
Robert S. Hall, Jr.
David E. Aaronson

424 Fifth St., N.W.
Washington, D.C.

Counsel for Appellant
(Appointed by this Court)

_____
DAVID E. AARONSON

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been served at the office of John Terry, Assistant United States Attorney, United States District Courthouse, Washington, D.C., this _____ day of June, 1965.

_____
David E. Aaronson

APPENDIX

RELEVANT PORTIONS OF STATUTES INVOLVED

Amendment IV of the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 26, United States Code, Section 4704(a) provides:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Title 21, United States Code, Section 174 provides in part:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

Title 22, District of Columbia Code, Section 1515 provides in part:

> "Whoever is found in the District in a gambling establishment or an establishment where intoxicating liquor is sold without a license or any narcotic drug is sold, administered, or dispensed without a license shall, if he knew that it was such an establishment and if he is unable to give a good account of his presence in the establishment,

be imprisoned for not more than one year or fined not more than $500 or both.

Title 23, District of Columbia Code, Section 301 provides in part:

"Upon complaint, under oath, before the Municipal Court for the District of Columbia, or a United States commissioner, setting forth that the affiant believes and has good cause to believe that there are concealed in any house or place articles stolen, taken by robbers, embezzled, or obtained by false pretenses, forged or counterfeited coins, stamps, labels, bank bills, or other instruments, or dies, plates, stamps, or brands for making the same, books or printed papers, drawings, engravings,photographs, or pictures of an indecent or obscene character, or instruments for immoral use. . . particularly describing the house or place to be searched, the things to be seized, substantially alleging the offense in relation thereto, and describing the person to be seized, the said court or United States commissioner may issue a warrant either to the marshall or any officer of the Metropolitan Police commanding him to search such house or place for the property or other things, and, if found, to bring the same, together with the person to be seized, before the Municipal Court for the District of Columbia or United States commissioner issuing said warrant, as the case may be.

Title 25, District of Columbia Code, Section 129 provides in part:

(a) A search warrant may be issued by any judge of the Municipal Court for the District of Columbia or by a United States commission for the District of Columbia when any alcoholic beverages are manufactured for sale, kept for sale, sold, or consumed in violation of the provisions of this designated for use in connection with such unlawful manufacture for sale, keeping for sale, selling, or consumption may be seized there under, and shall be subject to such disposition as the court may make thereof, and such alcoholic beverages may be taken on the warrant from any house or other place in which it is concealed.

(b) A search warrant cannot be issued but upon probable cause supported by affidavit particularly describing the property and the place to be searched.

(c) The judge or commissioner must, before issuing the

warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

(d) The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing they exist.

(e) If the judge or commissioner is thereupon satisfied of the existence of grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant signed by him with his name of office to the major and superintendent of police of the District of Columbia or any member of the Metropolitan Police Department, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the place named for the property specified and to bring it before the judge or commissioner.

. . .

(g) The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 4(c)(3) provides:

The warrant shall be esecuted by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant, as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,055

MILTON T. SMITH, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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United States Court of Appeals
FILED
CLERK

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOSEPH A. LOWTHER,
CAROL GARFIEL,
Assistant United States Attorneys.

Cr. No. 691-64

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Was appellant lawfully arrested on June 10 for being knowingly present in an illegal establishment, when an undercover officer, who had just purchased illegal whiskey and arrested its vendor, saw appellant run out of an adjoining room and heard him say he was running because he feared being arrested?

2) Was appellant lawfully arrested at 2 a.m. on June 18 when the arresting officer knew of the existence of a warrant for appellant's arrest for robbery and told him he was under arrest for robbery, and appellant saw the warrant itself by 9 a.m., there being no affirmative indication that he earlier requested to see the warrant or that he was *not* told of its existence when arrested?

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

OTHER REFERENCES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,055

MILTON T. SMITH, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

After a jury trial in September, 1964, appellant was convicted on two counts each of facilitating the concealment of illegally imported narcotics (21 U.S.C. § 174) and purchasing narcotics not in the original stamped package (26 U.S.C. § 4704(a)). He was sentenced to imprisonment for a period of one to six years on each of the counts charging violation of section 4704(a) and for six years on each of the section 174 counts, all sentences to run concurrently. This appeal followed.

The motion to suppress

Before trial, appellant moved to suppress the narcotics referred to in the indictment. This motion was heard and

denied by Judge Sirica on August 31 and September 1, after a hearing at which the following testimony was adduced.

The June 10 arrest.

At 8:05 a.m. on June 10, 1964, Officer Leonard P. Cousin of the Gambling and Liquor Squad, Metropolitan Police Department, walked in the open back door of the house at 1402 Swann Street, Northwest (H. Tr. 3, 5, 11, 17-19).[1] That house had been raided many times, and is well known to many members of the police force as a place where narcotics and bootleg whiskey are available for sale, where gambling abounds, and prostitutes congregate (H. Tr. 11, 15, 31, 40). Officer Cousin, wearing plain clothes, walked through a back room into a hall where there stood a bar and a bartender selling whiskey (visible from the back door). He could see no license authorizing the sale of liquor on the premises. However, he was able to purchase a half pint of whiskey from the bartender, one Nathaniel Walker, and immediately thereafter revealed his true identity and placed Walker under arrest for selling liquor illegally. Officer Herman McNeil, who had observed this entire transaction from the rear doorway, came in after signalling to some waiting officers and announcing his identity. (H. Tr. 3-5, 11, 15, 18-20.) Seconds later, appellant Smith came running out of an adjoining room towards the back door and almost bowled over Officer Cousin. The latter stopped appellant and asked why he was running. Appellant replied, "I heard the word police, and I want to get out of here before I get arrested." (H. Tr. 7-8, 18, 20, 25.) To Cousin's inquiry what appellant was doing in the house, he responded, "I came here to buy my whiskey. I come here often to buy whiskey." He then ran off to the exit, and bumped

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[1] "H. Tr." refers to the transcript of proceedings on the motion to suppress before Judge Sirica on August 31 and September 1. "T. Tr." references are to testimony at the trial before Judge Matthews on September 21.

into Officer McNeil who pushed him back into the room. Officer Cousin then caught appellant on the shoulder and placed him under arrest for being present in an illegal establishment. (H. Tr. 8, 12, 26-28.) Upon searching appellant, Officer Cousin discovered a tape-covered vial in his right hand, which he was holding behind his back, and another vial in his right rear trousers pocket. Each vial held scores of capsules filled with a white powder. (H. Tr. 9-10, 27-29, 35.) The vials were turned over by Officer Cousin to Detective David Paul of the Narcotics Squad, who arrived at 1402 Swann Street at about 8:30 a.m. to escort appellant down to Headquarters, where he was charged with presence in an illegal establishment and with violations of the Harrison Narcotics Act (H. Tr. 34-37).

The June 18 arrest.

On the afternoon of June 17, 1964, a warrant was issued for the arrest of appellant Smith for robbery, upon complaint of one Lilly Hicks. The warrant itself was placed on file in the office of the Robbery Squad. (H. Tr. 44-46, 67-68.) Some time between midnight and 1 a.m. on the morning of June 18, Lilly Hicks and her husband appeared at No. 10 Precinct and asked that an officer be sent to their apartment, since Smith had called and threatened to return. Lt. Edwin Ruff, who had heard of the warrant for Smith's arrest over the teletype from Headquarters, had Officer Simmons call the Robbery Squad and verify the existence of the warrant. The warrant itself was not available at that moment. Lt. Ruff then (at about 1 a.m.) sent Officers William Best and Sibron Isom to accompany the Hickses to their home, with instructions to arrest appellant if he appeared. (H. Tr. 49-50, 56-60, 62-63.) At about 2 a.m. the appellant arrived, was arrested for robbery by Officer Isom, and brought inside the Hicks' apartment (H. Tr. 51-53). A search of appellant's person by Officer Best produced a manila envelope containing white powder capsules (H. Tr. 53-54). Later that

morning, betwen 8:30 and 9 a.m., in the Robbery Squad office, the warrant was displayed to appellant (H. Tr. 46-47).

The evidence at trial

At the outset of the trial before Judge Matthews, appellant renewed his motion to suppress, which was again denied (T. Tr. 6-7). Officer Cousin testified that on the morning of June 10 he arrested appellant at 1402 Swann Street, Northwest, and in the course of a search found in appellant's right rear trousers pocket Government Exhibit 1, a vial holding capsules that contained a white powder, and in appellant's right hand a similar vial, Government Exhibit 2. There were no Internal Revenue stamps on either vial, nor was there any original stamped package around the premises. Officer Cousin delivered the vials to Detective Paul at about 8:30 that morning. (T. Tr. 7-12.) Detective Paul testified that he received the vials, one of which contained 60 capsules and the other 77 capsules, performed a field test on a portion of the powder from one of the capsules, and delivered both vials and their contents to the United States Chemist, John Steele, on June 15 (T. Tr. 34-35). Dr. Steele testified that the contents of Exhibit 1 constituted 16 per cent heroin hydrochloride, and the contents of Exhibit 2 were 70.16 per cent heroin hydrochloride (T. Tr. 86-87).

Officers Best and Isom related the circumstances of appellant's arrest at about 2:10 a.m. on June 18 and the subsequent search, which revealed in appellant's left sock a manila envelope, Government Exhibit 4, containing white capsules. There were no Internal Revenue stamps on or about that envelope, and no original stamped package was seen. (T. Tr. 39-43, 53, 65-71.) Testimony traced the custody of Exhibit 4 from Officer Best to Dr. Steele (T. Tr. 43-44, 54-55, 61-63, 71-73, 75-77), whose analysis revealed that the white powder in the capsules in Exhibit 4 consisted of 16.6 per cent heroin hydrochloride (T. Tr. 88). The introduction in evidence of exhibits 1 through 6 concluded the proof (T. Tr. 101).

STATUTES AND RULE INVOLVED

Title 21, United States Code, § 174 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

* * * *

Title 26, United States Code, § 4704 provides in pertinent part:

> (a) *General requirement.*
>
> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

* * * *

Title 22, District of Columbia Code, Section 1515(a), provides:

> Whoever is found in the District in a gambling establishment or an establishment where intoxicating liquor is sold without a license or any narcotic drug is sold, administered, or dispensed without a license shall, if he knew that it was such an establishment and if he is unable to give a good account of his presence in the establishment, be imprisoned for not more than one year or fined not more than $500, or both.

Title 4, District of Columbia Code, Section 140 provides:

> The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District, but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law.

Rule 4(c)(3) of the Federal Rules of Criminal Procedure provides in pertinent part:

> The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. . . .

SUMMARY OF ARGUMENT

I

The building at 1402 Swann Street, Northwest, is well-known to police officers in the District as a hotbed of gambling, narcotics, illegal whiskey, and prostitution. It has been the subject of many raids and has seen many arrests. In the course of his duties as a member of the police force, Officer Cousin, in plain clothes, entered the open rear door of 1402 Swann Street one morning to determine whether crimes were there and then being consummated. From the door through which he entered, one could see a bar and bartender. Once inside, Officer Cousin purchased whiskey from the bartender and, seeing no license authorizing the sale of the whiskey, identified himself and arrested the man. Within seconds, appellant came fleeing out of a front room and said he was running because he had heard the word police and feared arrest. He told the officer he was in the building to buy whiskey, which he often does there. At this, Officer Cousin had probable cause from his own personal observations to believe appellant was present in the illegal establishment, without good cause and knowing its illegal character. He thereupon properly arrested appellant for violation of 22 D.C. Code § 1515, and the consequent search was lawful.

II

Rule 4(c)(3) of the Federal Rules of Criminal Procedure plainly provides that an officer effecting an arrest pursuant to a warrant need not have possession of the warrant at that time. No authority supports appellant's contention that the officer must obtain the warrant if practicable, nor would it have been reasonable under the circumstances of this case to require the officers to procure the warrant before the arrest. Appellant had ample opportunity to demonstrate that the requirements of Rule 4(c)(3) were not met, and failed. In any event, the sentences imposed on the counts relating to narcotics seized

after this June 18 arrest are concurrent with those imposed on the remaining two counts; any conceivable irregularity in appellant's arrest is therefore harmless.

ARGUMENT

I. Appellant was properly arrested without a warrant when he committeed a misdemeanor in the presence of Officer Cousin.

(H. Tr. 3-5, 7-8, 11-12, 14-15, 17-20, 21-22, 25-28, 31, 40)

In plain clothes, acting as an undercover agent, Officer Cousin went early one morning to a house notorious for illegal liquor, gambling, narcotics, and prostitution. He entered the open rear door of the building, walked up to a bar, and purchased a half pint of illegal whiskey. He thereupon identified himself as a policeman and arrested the vendor of the whiskey, who had committed in his presence the misdemeanor of selling whiskey without a license, in violation of 25 D.C. Code § 109. Seconds later, appellant Smith came bounding out of an adjoining room and was stopped by the officer who asked why he was running. Appellant replied "I heard the word police, and I want to get out of here before I get arrested." Officer Cousin inquired what appellant was doing in the building, and was told that appellant had come to buy liquor, as he frequently does. Appellant then ran off towards the back door, was stopped by a second officer, Officer McNeil, and arrested by Officer Cousin for being present in an illegal establishment, in violation of 22 D.C. Code § 1515. (H. Tr. 3-5, 7-8, 11-12, 14-15, 17-20, 25-28, 31, 40.)

Appellant argues that Officer Cousin's entry into the premises at 1402 Swann Street was illegal in two respects: first, because it was to effect a general search of the premises, without a warrant, and second, because it did not meet the requirement of 18 U.S.C. § 3109. Admittedly, Officer Cousin did not intend to arrest any particular per-

son. However, nothing on this record indicates that he had any intention of seizing anything unless and until he observed a crime being committed. The house at 1402 Swann Street is a notorious den of iniquity. As such, it was open to any who wished to partake of the illicit pleasures available therein. Fulfilling his function as a police officer, sworn to detect crime and arrest its perpetrators, Officer Cousin entered this sink of corruption to determine whether any crimes were there and then being committed. That he intended to arrest anyone whom he observed breaking the law certainly does not make his entry illegal. *Cf. Hutcherson* v. *United States*, D.C. Cir. No. 18375, March 18, 1965. Appellant apparently concedes that if Officer Cousin entered the house for the purpose of investigating and then arrested one who, in his presence, committed a crime, that arrest would be lawful (Br. 22). A brief reading of the evidence adduced at the hearing below compels the conclusion that this is precisely what occurred in this case. As far as appellee is aware, no case has yet held section 3109 applicable to the entry of an undercover agent searching for violations of law, nor has any case held that such an officer must possess a warrant to validate his entry; section 3109 does, however, apply to raiding officers. See *Williams* v. *District of Columbia*, 167 A.2d 893 (Mun. Ct. App. 1961) (undercover agents entered after-hours club to obtain evidence); *Stagecrafters Club, Inc.*, v. *District of Columbia*, 89 A.2d 876 (Mun. Ct. App. 1952) (same); *Hoover* v. *District of Columbia*, 42 A.2d 730 (Mun. Ct. App. 1945) (warrantless arrest of persons who sold illegal whiskey to undercover agents lawful); *Cf. Fisher* v. *United States*, 92 U.S. App. D.C. 247, 205 F.2d 702, *cert. denied*, 346 U.S. 872 (1953) (from public valet and shoeshine shop, officers observed lottery in open back room.)

By the time Officer McNeil prevented appellant from escaping out of 1402 Swann Street, both he and Officer Cousin had probable cause, from their own observations, to believe appellant guilty of knowingly being present in

an illegal establishment. That is all that is required to justify an officer in arresting for a misdemeanor committed in his presence. 4 D.C. Code § 140; *Garske* v. *United States*, 1 F.2d 620 (8th Cir. 1924); *United States* v. *Rembert*, 284 Fed. 996 (S.D. Tex. 1922); *see Murphy* v. *United States*, 290 F.2d 573 (3d Cir. 1961), *vacated on other grounds*, 369 U.S. 402 (1962); *cf. United States*, v. *Viale*, 312 F.2d 595 (2d Cir.), *cert. denied*, 373 U.S. 903 (1963).[2] Probable cause may of course be provided by admissions of the person arrested. *Rios* v. *United States*, 364 U.S. 253, 262 (1960); *Cunningham* v. *United States*, —— U.S. App. D.C. ——, 340 F.2d 787 (1964); *People* v. *Clark*, 9 Ill. 2d 400, 137 N.E.2d 820 (1956) (alternative holding). Appellant was observed by the officers inside the premises at 1402 Swann Street, concededly an illegal establishment. Appellant admitted within the hearing of both officers that he was fleeing to avoid being arrested —that is, that he knew that the police were likely to arrest him if they found him. This more than justified the officers in inferring that appellant was aware of the nature of his surroundings and that he had no good reason for being there. Both officers thus had personal knowledge of facts constituting probable cause to believe appellant was knowingly present in an illegal establishment without a lawful excuse. (H. Tr. 7-8, 25.) Officer McNeil had even greater cause to arrest appellant, for he heard appellant say he was there to buy liquor and that he often came to buy whiskey. The description of the flat leaves little doubt that its customers, such as appellant, knew it to be an illegal establishment, for it resembled no normal licensed liquor store and displayed no license (H. Tr. 4, 15, 21-22). See *Wyche* v. *United States*, 90 U.S. App. D.C. 67, 193 F.2d 703 (1951), *cert. denied*, 342 U.S. 943 (1952); *Beard* v. *United States*, 65 App. D.C. 231, 238, 82 F.2d 837, 844, *cert. denied*, 298 U.S. 655 (1936). Since appellant was lawfully arrested, the ensuing search was

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[2] This argument was made by the Government in *Scott* v. *United States*, D.C. Cir. No. 19139, affirmed by order on May 18, 1965.

reasonable and the trial court properly denied his motion to suppress the narcotics seized from him on June 10.

II. The arrest of appellant on June 18 complied in all respects with the requirements of Fed. R. Crim. P. 4(c)(3).

Rule 4(c)(3) of the Federal Rules of Criminal Procedure sets forth the manner in which an arrest with a warrant must be made:

> The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued.

Nothing in this rule or in the cases decided under it requires or even suggests that an arresting officer must have possession of the warrant if practicable. There is simply no authority supporting appellant's contention that an arrest is invalidated if the arresting officer neglected to obtain the warrant first. The rule itself plainly provides otherwise. In any event, it is unrealistic in the extreme to urge that a precinct policeman must wait for delivery of a warrant from Headquarters when, in the middle of the night, a victim of robbery, rape, and sodomy asks protection because the perpetrator of those crimes, for whose arrest a warrant has been issued, is returning immimently to her home.

Appellant also contends that his arrest on June 18 did not comport with the requirements of Rule 4(c)(3) because the record does not affirmatively disclose whether Officer Isom informed him that his arrest for robbery was on a warrant. He requests that if this Court considers the record on this point unclear, it remand for a hearing to determine what statements were made to ap-

pellant on his arrest. (Br. 40.) Appellee submits that the time for appellant to ventilate the question of whether Rule 4(c)(3) was complied with in all respects was at the hearing on his motion to suppress, which extended over two days. The record does show that Officer Isom told appellant he was being arrested for robbery (H. Tr. 52), and that the warrant itself was shown to appellant within seven hours of his arrest (H. Tr. 47). The procedures followed were proper. See *United States* v. *Pisano*, 193 F. 2d 361 (7th Cir. 1951). In any event, the sentences imposed on counts two and four, which related to the narcotics seized on June 18, are to run concurrently with those imposed on counts one and three, relating to the June 10 narcotics. Thus any imaginable irregularity in appellant's June 18 arrest is harmless. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Redfield* v. *United States*, 117 U.S. App. D.C. 231, 328 F.2d 532, *cert. denied*, 377 U.S. 972 (1964).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOSEPH A. LOWTHER,
CAROL GARFIEL,
Assistant United States Attorneys.

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